Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1619

DELBERT ALLEN GIBSON
and A. L. REEVES, JR.,
Petitioners

v.

THE STATE OF TEXAS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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Petitioners, DELBERT ALLEN GIBSON and A. L. REEVES, JR., pray that a Writ of Certiorari issue to review the judgment of the Texas Court of Criminal Appeals entered in this case on the 11th day of February, 1976, denying Petitioners' Motion for Leave to File Rehearing Motion.

OPINION BELOW

Petitioners were convicted on Guilty Pleas before the 22nd Judicial District Court of Hays County, Texas. The Opinion of the Texas Court of Criminal Appeals affirm-

ing the judgment of the District Court is reported at 532 S.W.2d 69 and is reprinted in Appendix "A", infra at A 1.

JURISDICTION

The Texas Court of Criminal Appeals affirmed the State District Court convictions on November 19, 1975, Judge Truman Roberts dissenting by written opinion. Petitioners' Motion for Leave to File Rehearing Motion was denied without opinion on February 11, 1976. (Appendix "B", infra at A 24) Jurisdiction of the Supreme Court is invoked under the authority of 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether Petitioners were denied due process of law by the trial court's failure to make a judicial determination of voluntariness of a plea of guilty, upon timely request?
2. Whether Petitioners were denied due process of law where the trial court refused their timely Motion to Withdraw [their pleas] where the trial court would not grant the sentence concessions agreed upon by the parties?
3. Whether Art. 26. 13, Texas Code of Criminal Procedure (1973) as applied, denied Petitioners due process of law?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; . . . and to have Assistance of Counsel for his defense."

The Fourteenth Amendment of the United States Constitution provides in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law;"

Article 26.13, Texas Code of Criminal Procedure (1973) provides:

> (a) Prior to accepting a plea of guilty or a plea of nolo contendre, the court shall admonish the defendant of:
>
> 1. the range of punishment attached to the offense; and
>
> 2. the fact that any recommendation of the prosecuting attorney as to punishment is not binding on the court.
>
> (b) No plea of guilty or plea of nolo contendre shall be accepted by the court unless it appears that the defendant is mentally competent and the plea is free and voluntary.
>
> (c) In admonishing the defendant as herein provided, substantial compliance by the court is sufficient, unless the defendant affirmatively shows that he was not aware of the consequences of his plea and that he was misled or harmed by the admonishment of the court.

STATEMENT OF FACTS

On September 7, 1973, the Hays County[1] Grand Jury returned two indictments of burglary against each petitioner.[2] (Tr. 201, 201a)[3]

On November 19, 1973, Petitioners waived arraignment, entered a plea of "not guilty" and requested trial by jury. (Tr. 259)

In March 1974, a Motion to Set [for trial], a Motion to Consolidate and an Application for Subpoenas were filed in this case by the Hays County District Attorney.[4] The Motion to Consolidate was set for hearing on May 16, 1974 and the cases set for jury trial on July 29, 1974. (Tr. 208-213)

Sometime prior to the hearing on the Motion to Consolidate, "plea bargain" discussions took place between the district attorney and defense counsel, at least in part in the presence of Petitioners and the Hays County Sheriff. (Tr. 125, 126)

At the May 16th hearing on the Motion to Consolidate, all three defendants changed their pleas from "Not Guilty" to "Guilty." (Tr. 81, 82, 88, 93).

Certain questions were ask each defendant by the trial court pursuant to Art. 26.13, Tex. Code Crim. Proc.

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1. Hays County is located about halfway between Austin and San Antonio, Texas and had a 1970 population of 27,642.

2. Larry Wayne Miller was indicted at the same time and plead guilty with petitioners. He received a five-year probated sentence and did not appeal his conviction.

3. (Tr. __) indicates reference to the trial record.

4. District Attorneys, under Texas law, are elected to office by the people of their district. The Hays County District Attorney's district at the time of trial was Hays, Comal and Caldwell counties. He had no assistant district attorneys.

(1973). The trial court, in part, asked all three defendants if they had been promised anything and all said no.[5] The trial court advised the three that the Court was not bound by the recommendation of the prosecutor, if any recommendation were made. (Tr. 93, 94, 97). The Court asked no questions of defense counsel or the district attorney concerning the existence of or nature of the "plea bargain."

Following questioning by the court and the admission of stipulated evidence, the trial court accepted the pleas and set the cases for assessment of punishment on July 11, 1974. (Tr. 101).

At the assessment of punishment hearing, prior to the assessment of punishment, the district attorney "recommended" that the court grant Petitioners a probated sentence.[6]

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5. Among such questions, the trial court asked Petitioner Gibson:

> "Have you been promised anything in this case?
> The Defendant: No, sir.
> The Court: —to plead guilty. You know that if you plead guilty in this case, and the evidence shows you're guilty, that the attorneys may make a recommendation to the Court, and that's all that is, a recommendation. I do not have to take the recommendation.
> The Defendant: Yes, sir.
> The Court: I will consider it, but that's all; just consider it. If they recommend that you be granted probation, I may deny that recommendation and send you to the penitentiary for as much as twelve years. You understand that?
> The Defendant: Yes, sir.
> The Court: Knowing all that, do you still plead guilty in this case?
> The Defendant: Yes, sir." (Tr. 84-85).

6. Mr. Fiedler: "Your Honor, by way of statement here, I've spent a great deal of time in this case talking with Mr. Zimmerman, defense counsel. This is one of our older cases that got caught up

The Court then assessed punishment for each defendant at five years confinement in the Texas Department of Corrections, granting probation of such term only to defendant Larry Wayne Miller. See 2. (Tr. 113). Defense counsel immediately asked to withdraw the pleas.[7] (Tr. 115).

During discussion with counsel and the District Attorney, the trial court indicated that he was aware of the existence of the "plea bargain."[8]

Petitioners' counsel filed a Motion for New Trial on July 19, 1974, wherein he raised the issue of "induced"

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in some of our problems of last year. *This is a negotiated plea. Our agreement is to leave the terms of probation*—and if an election is made to go into the new code. To my knowledge no election has been made to go into the new code. So a fine is not applicable—*but to leave the terms of the probation up to the Court* because we see a varying social history between these young men. *But this is a negotiated plea.* We have no additional evidence, but would, after talking to counsel, would recommend to the Court that these three defendants be given probation. *I think that through conversation with counsel, that's part of the reason for their entering a plea.*" (Emphasis added)

7. Defense counsel indicated that he understood that the trial court had the discretion to grant probation if he wished but explained that the pleas would not have been changed but for the "recommendation" of probation. (Tr. 115, 116). The district attorney stated: "May I respond, Your Honor? It's the state's under standing in this case that these three defendants did change their plea, and *their change of plea was directly caused by the agreements made between counsel* to dispose of this case, that when those true facts are made known in this Motion for New Trial that will be the truth." (Tr. 116). (Emphasis added)

8. In response to the request to withdraw the pleas, the Court stated, in part: "Of course I'm still not bound to grant a new trial unless there's substantial reasons shown in your Motion for New Trial that I feel they're justified. Just saying because you agreed to it. *Because I knew you agreed to it when I pronounced their sentence. You're not telling me anything up to this point I didn't already know . . .*" (Tr. 117). (Emphasis added)

plea; stating that Petitioners had been "assured" of receiving probation by agents of the State. (Tr. 18-21). With such motion, defense counsel filed affidavits from the Hays County Sheriff and District Attorney. Such affidavits stated that Petitioners would not have changed their pleas but for the "inducement" of some "assurances" of their receiving probation. (Tr. 22-24, Appendix "C", infra at A 26).

On August 28, 1974, the Court heard evidence thereon and denied the Motion for New Trial. (Tr. 122-149).[9] Sentencing was set for September 23, 1974. (Tr. 149).

On September 20, 1974, Petitioners' counsel filed a Motion to Set Aside Judgment of Guilt on Plea of Guilty, the Assessment of Punishment and to allow a withdrawal of their Pleas of Guilty. Such motion affirmatively raised the issues of inducement, involuntary pleas and denial of due process by the failure of the trial court to allow withdrawal of the pleas. (Tr. 29-47). A supporting brief was also filed with such motion. (Tr. 35-47). Petitioners requested a hearing on the motion and that upon such hearing they be allowed to withdraw their pleas. (Tr. 33-

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9. Testimony adduced indicated that Petitioners were told by the district attorney that they would be granted probation. The Court developed, by questions to the defendants, that each Petitioner had been advised by the court that the court was not bound by the recommendation of the state. At one point the Court asked Petitioner Gibson: "You told the Court here on May 16th that you had not been promised anything to plead guilty. Now you're telling me that you had been promised something. Is that correct?

The Defendant: Well, Your Honor, whether it's a promise, or an assurance, or guarantee, whatever you want to call it, I was under the impression that I was going to get probation if I changed my plea to guilty.

The Court: But you heard what the Court told you that day?

The Defendant: Yes, sir." (Tr. 140-141).

34). On September 23, 1974, Petitioners' counsel filed a Motion to Set Aside Judgment of Guilty on Plea of Guilty and the Assessment of Punishment. (Tr. 48). Such motion and the relief sought is not relevant to the issues herein.

Sentencing was reset for November 21, 1974. At the hearing, prior to sentencing, the Hays County Sheriff [Bobby Kinser], defense counsel [Roger Zimmerman] and the trial judge [Terry L. Jacks], testified concerning their respective roles in this case and testified about past "plea bargaining" in Hays County. Sheriff Kinser testified that he had an active part in the "bargaining" and that the defendants were told they would receive probation if they plead guilty. (Tr. 157-159). He also testified that he did not know of any other case in Hays County where the defendant agreed to plead guilty for probation, yet had not received probation. (Tr. 160). He also testified that restitution by Petitioners was part of the "bargain" and that restitution had been made. (Tr. 161). Defense counsel testified that plea bargaining had taken place after Petitioners had plead "not guilty," between he, the Sheriff and the district attorney and that the district attorney had agreed to join in a Motion for New Trial if the court would not accept the agreement. (Tr. 163). Defense counsel also testified that he had handled a number of criminal cases, and many guilty pleas, in that court but couldn't remember ever having the court turn down a recommendation. (Tr. 164). The trial court then testified, admitting that he was aware of "plea bargaining" in his court and other courts. Upon being asked if he had ever previously refused the recommendation of the State, the court said he had, in one case, but couldn't remember if it was before or after this case. (Tr. 172-173). The

court admitted that defendants generally deny that they have been promised anything in plea bargain cases when asked by the court during the admonishment state. (Tr. 174).

Following testimony, the trial court indicated that his concern was whether the state would "vigorously prosecute" *if* he allowed the pleas to be withdrawn. (Tr. 178). The trial court further indicated that he was concerned with the public reaction where he granted probation upon the recommendation of the state.[10]

Defense counsel requested that the trial court rule on the issues raised. (Tr. 183-185). The court entered a colloquy with the district attorney about who would try the case if withdrawal were allowed. (Tr. 183, 189). The court indicated that he had to be assured that the case would be prosecuted or he would not allow the pleas to be withdrawn. (Tr. 191). Defense counsel again asked for a ruling on the issue of voluntariness. The court refused to rule on the issue.[11]

The court denied the relief sought and sentenced Petitioners to five-years confinement in the Texas Department

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10. The Court: "I'm the one that signs the judgment; I have had people get on the radio, mind you, and criticize me for granting probation that was recommended by the State . . ." (Tr. 183, 184).

11. The Court responded: "I'm going to do one or two things. I'm going to set it aside or grant it. I'm not going to grant it until I have found some assurance that this case will be tried, by an attorney who hasn't disqualified himself. Mr. Fielder, the District Attorney, for reasons of his own, hasn't made up his mind on it . . . He's got to put his file, or what file he has, in the hands of another attorney. If that attorney comes to me and says, I can try this case, well, then I will reconsider the Motion. Until that's done, I don't feel like I better change my position on it." (Tr. 192).

of Corrections. (Tr. 194, 195). (Judgment and Sentence at Appendix "D", infra at A 37).

Timely notice of appeal was given and appeal had to the Texas Court of Criminal Appeals. (Tr. 1950).

By brief filed in the Court of Criminal Appeals on April 17, 1975, Petitioners raised the issues of inducement, involuntary waiver of constitutional rights, error by failing to allow withdrawal of the pleas, error by failing to rule on the issues presented in the trial court and error by insisting on "vigorous prosecution" as a condition of allowing the withdrawal of the pleas. (Appellants' brief).

The State's brief was filed on May 13, 1975. District Attorney Fielder confessed error by the state having 'induced the pleas," that the waiver of constitutional rights was not voluntary, that the trial court erroneously failed to grant a new trial, that the refusal to rule on the issues was error and that the court's insistence on conditions from the state before allowing withdrawal of the pleas was error. (Appellees' brief).

Oral argument was heard before the Court of Criminal Appeals on May 28, 1975. On October 3, 1975, State's Attorney Vollers[12] filed a Supplemental State's Brief arguing for affirmance of the convictions. The convictions were affirmed on November 19, 1975. Timely Motion for Rehearing, Motion for Leave to File Rehearing Motion and a Motion to Stay the Mandate were filed with the Court of Criminal Appeals. In the Brief in Support of the Motion for Rehearing, Petitioners again requested

12. States' attorney Vollers is the "State Prosecuting Attorney" by virtue of his being appointed to such position by the Court of Criminal Appeals, serving two year appointed terms.

an evidentiary hearing. The motion for leave to file rehearing was denied without written opinion on February 11, 1976. The Motion to Stay the Mandate was denied on February 19, 1976. Petitioners filed a Motion to Stay the Mandate with Mr. Justice Powell on February 19, 1976, and such motion was denied on February 24, 1976.

REASONS FOR GRANTING THE WRIT

The rulings of the Trial Court and the holding of the Texas Court of Criminal Appeals in this case are utterly antagonistic to the Constitutional guarantee of due process of law. The holding of the Texas Court of Criminal Appeals cannot be the law because it benefits neither society nor individuals and inures only to the harm of all parties concerned.

There is an overriding need for this court to clarify to the State the Constitutional guarantees which apply to pleas of guilty. *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709 (1969), and *McCarthy v. United States,* 394 U.S. 314, 89 S.Ct. 1166 (1969), approach the issues of this case but are not conclusive thereon. *Santobello v. New York,* 404 U.S. 257, 92 S.Ct. 495 (1971), renders limited support, although it approaches the overwhelming basic unfairness involved in this case. *North Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160 (1970), describes the standard for pleas, but relates to a different problem.

The factual basis of the plea bargain must be placed on the record and it will require ruling of this court to impose that requirement on the States.

Daily, in courts across the nation, defendants agree to plead guilty after a "bargain" is struck with the state.

This bargain is not inherently defective nor unconstitutional for it is but the simple realization that it is often unnecessary for a defendant to require trial on the merits where there is, in fact, no dispute as to the issue of guilt. A plea "bargain" is the natural and consequential result of the parties realizing that the true issue, in most criminal cases, is not guilt, it's punishment. Once the parties agree on the punishment to be "recommended" and the count concessions to be made, if any, then they can turn to the court for its imprimatur. This has been done historically by going before the trial court, confessing guilt, denying that any promises have been made, and solemnly affirming that the trial court is not bound by any "deals". This scenario took place in this case and it takes place in several other states. This scenario is a lie. It is a blight on our system, and has far outlived its usefulness, if it ever had any usefulness. There are no legitimate reasons for continuing to accept this charade and there are many reasons to forever ban it from our courtrooms.

As a practical matter, the prosecutor is the sentence bargaining agent for the state, for he and he alone secures all agreements, whether to "recommend" a particular sentence, "recommend" count concessions or "recommend" dismissing the case. But historically, the power to sentence or dismiss some or all counts of an indictment rests solely with the judge. From that conflict, all other plea bargaining conflict stems. The prosecutor is charged with bringing the accused to the bar of justice, but in truth and in fact, is also the sentencing agent. The practical model fails to take into consideration that only the judge, in theory, has any power to mete out sentencing concessions. The method by which the system handles this very real conflict is for all parties to "act" as if the judge is determining the sentence when, in fact, he is simply, in many cases, affirming the pre-determined sentence or count concessions made by the prosecutor. The net result is that the defendant or his counsel is forced to do all of his bargaining with someone who in theory has no power whatsoever to grant concessions, but any concessions made, and in fact relied on, stem from the office of the prosecutor. The defendant is forced by a dishonest system to not only deny the effect, but also the existence of the fact that a plea bargain has been struck. In theory the defendant opens himself to any sentence within the appropriate range and to be sentenced by a party who isn't even privy to the "deal". In truth, he agrees only to plead guilty to a pre-determined "bargain". Therein lies the fault. When the defendant is brought before the court to plead guilty, the court should be required to bare the negotiations on the face of the record. By doing so, no harm is done to any party, and great harm may be prevented. If the court is willing to accept the plea bargaining struck by the defendant, his counsel and the state, then the court should accept the plea. If the court will not accept the results of the bargain, then he must allow the defendant to withdraw his plea. This process harms neither the state, society, nor the defendant. It is merely an honest and fair realization of the true process by which most persons are brought to justice.

Also of importance herein is the attempt by the State of Texas, by the application of its admonition statute, to place all burden of showing involuntariness or lack of understanding on the defendant and then to refuse to consider such proof. This statute not only encourages the covering up of the "bargain" but also virtually precludes later review of such bargain by requiring that the de-

fendant accept that the court need not accept the recommendations by the state. If the evidence presented in this case did not establish that the pleas were not voluntary, Petitioners submit that such burden could never be met. Prior to State's Attorney Vollers entering into this case, *some four months after oral argument,* no one had contested that the pleas were, in fact, involuntary. The admonition statute only requires substantial compliance in the absence of proven harm. The admonition statute was designed to prevent post-conviction attacks and it does so very well, both for legitimate and illegitimate attacks. The application of the requirement that the trial court advise the defendant that the state's recommendation as to sentence is not binding serves no legitimate purpose and should be stricken as unconstitutional.

ISSUE ONE

The failure of a Trial Court to make a judicial determination on the voluntary nature of a plea of guilty, in a plea bargain case, prior to sentence finalization, after a timely motion by the Defendants raising the issue of voluntariness, is a denial of federally protected constitutional rights.

ARGUENDO

The covert or sub-rosa nature of plea bargaining in Texas, and in other states, cannot be used to validate an otherwise invalid waiver of basic constitutional rights involved in the acceptance of pleas of guilty resulting from a hidden plea "bargain". The problem is not unique to these defendants, nor to Hays County or the State of Texas. The manifest injustice that occurred in this case is a scene repeated with tragic regularity in Texas and in other states.

The rule urged on this point would impose upon the state courts the need for a judicial ruling, after an evidentiary hearing, on the issue of the voluntariness of a plea of guilty where the defendant timely raises the question.

The court in this case conducted a hearing which made a prima facie case for a ruling of involuntariness based on uncontroverted testimony showing an agreement of probation between the state prosecutor, the defendants and their counsel; the court absolutely refused, in spite of timely demands, to make such a ruling on the face of the record. The Court of Criminal Appeals solemnized the breach of plea agreement relying on an "implied finding of voluntariness.' (App. "A" infra at A).

The plea bargain was sub-rosa or covert but it was known to all the parties; the court was aware a bargain had been agreed upon but did not develop the bargain on the face of the record. The court knew the defendants had been advised to answer negatively when he questioned them on inducements or promises; he knew the defendants, the prosecutor and the defense counsel would remain silent concerning the admonition that the court was not bound by a recommendation made by the prosecutor.

This practice has been consented to for many years in Hays County, Texas; the admonition by the court was simply procedural rote to these defendants and had little impact until the scenario was played out. No one was deceived except the defendants, certainly not the court as the record well reflects.

These defendants were entitled to a determination of whether their pleas had been induced, resulting in an involuntary plea, as well as manifest injustice; these de-

fendants were also entitled to have their agreement honored, or the plea withdrawn when the facts were developed. See *Santobello v. New York*, 404 U.S. 257 (1971).

There are two issues under the facts before this Court; first, was the failure to make a judicial finding of voluntariness a violation of due process of law? Second, does the record on its face negate the high court below's finding of "an implied finding of voluntariness"?

The procedure followed by the state district court below is inconsistent with the holding in *Kercheval v. United States*, 270 U.S. 200 (1972) relating to promises and unfulfilled promises. The implied finding of voluntariness of the pleas is in conflict with the Court's opinion in *Carnely v. Cochran*, 369 U.S. 506, 82 S.Ct. 884 (1962); it fails to meet the standards of *Boykin v. Alabama*, 395 U.S. 238 (1969) and *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074 (1965).

Denial of a judicial determination on the issue of voluntariness of a plea of guilty denies to the defendants a procedural right where waivers of such constitutional dimensions are involved, i.e., the Fifth Amendment right to remain silent, burden of proof on the State, the Sixth Amendment right to trial by jury, and the right to confront witnesses against them.

Such a denial took place and the defendants were victimized thereby. A conviction founded on an involuntary plea of guilty is constitutionally void.

The second issue herein relates to the uncontroverted testimony that a bargain was struck and the sworn testimony overwhelmingly supports a finding, "not implied" as the court below stated, but rather a finding that the

pleas were involuntary as a matter of law; there can be little dispute when the record as a whole is examined.

The court below had a constitutional obligation to determine that the pleas were voluntary before it accepted the plea as a basis for conviction.[13] Article 23.13, Tex. Code Crim. Proc. (1973) required an admonition which all parties historically considered mere rote.

The trial court had a duty to do more than it did; it had a duty to develop the bargain or agreement on the face of the record; it failed to do so; the court had a duty to rule on the voluntariness before sentence finalization; but it declined and refused to do so. Post plea justification of the acceptance of the plea under these facts is illusory and manifestly unjust; the reliance on formalistic recitations is spread across the face of this record. Such formalistic recitations and responses, dictated by the covert procedure required is the predicate for complaining that the court's rejection of the plea breached the agreement that induced the plea.[14]

Only when performance on the part of the state cannot disappoint or frustrate a defendant's reasonable expectations concerning sentence, will plea bargaining become and remain a truly effective device in criminal administration. Aside from this pragmatic necessity, fairness dictates the same results.[15]

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13. See *Machibroda v. United States*, 368 U.S. 487 (1962). *Kercheval v. United States*, 274 U.S. 220 (1927). *Waley v. Johnson*, 316 U.S. 101 (1942).

14. See *Gallegos v. United States*, 466 F.2d 740 (5th Cir. 1972).

15. See *State v. Thomas*, 61 N.J. 314, 294 A.2d 57 (1972).

The Court's action in refusing to rule on the issue of voluntariness, and the Court's refusal to find on these facts the unfilled promise as the prime catalyst to the plea change frustates any sense of fairness and is the anathema of due process and constitutional safeguards. For these reasons the Writ should be granted.

ISSUE TWO

The denial of the request to withdraw a Plea of Guilty, prior to sentence, based on the assertion of an involuntary plea, is in conflict with Federal Rule 11, The American Bar Association's Standards of Criminal Justice, and offends the constitutional mandates governing waivers of Fifth, Sixth and Fourteenth Amendment rights.

ARGUENDO

The defendants changed their pleas of "Not Guilty" to pleas of "Guilty" after a plea bargain with the District Attorney and the Sheriff; the agreement was clear, i.e., the defendants were to receive probation. Both defendants testified to this fact (Tr. 135, 121-23) and (Tr. 138-140). The District Attorney verified the agreement and his intent to stick with it. (Tr. 179, L 1-8); the prosecutor correctly observed that only two things would be fair, "either give them what they agreed to, or let them withdraw their plea, and we'll start again." (Tr. 181 L. 1-3).

Sheriff Kinser testified that the defendants were told that if they plead "guilty" and made restitution, then they would get probation, and would not have to go to jail. (Tr. 158, L 25, Tr. 159, L 1-3); the Sheriff testified the victims did not oppose probation (Tr. 157, L 1-12).

Sheriff Kinser testified that the defendants would not have changed their pleas if they had known there was any chance of them going to the penitentiary. (Tr. 159, L 13-17).

The trial court acknowledged he was aware of a plea bargain when he accepted the pleas; (Tr. 177, L 1-4); the trial court did not, prior to acceptance of the plea make any effort to develop the facts of the bargain on the face of the record. (Tr. 81-100); the trial court found that defendant Reeves had entered his plea of "guilty" uninfluenced in making his plea by any—promise, or persuasion. (Tr. 95, L 8-12), and that defendant Gibson had entered his plea of "guilty" uninfluenced by any—persuasion—(Tr. 86, L 1-3), and then found each defendant guilty on confessions and the oral stipulation of evidence. (Tr. 100, L 3-12)

After acceptance of the plea, at the assessment of punishment hearing,' the court was advised of the fact that the pleas were the result of a plea negotiation by the prosecutor. (Tr. 186, L 16-20)

The court was then advised by the prosecutor that the agreement for probation was the reason for their change of plea (Tr. 107, L 3-7); at this time the trial court advised—"I've got to make a decision on what I've got before me. I hope it's right, and I don't know. An honest person never knows when he's right or not." (Tr. 113, L 5-9).

The court then sentenced both defendants to 5 years in the Texas penitentiary (Tr. 115, L 204); defense counsel immediately requested to withdraw the pleas of "guilty" of both defendants. (Tr. 115. L 8-10); the court (in colloquy with District Attorney Fielder) ac-

knowledged he knew the state had agreed to probation when he pronounced their sentence. (Tr. 117, L 7-9).

At the Motion for New Trial, the prosecutor joined in the motion requesting that it be granted; he testified by affidavit under oath —. "There is not the slightest doubt in my mind that had these defendants thought they would not get probation, none of them would have changed their plea of "not guilty" to "guilty", and thereby given up their fundamental right to trial by jury." (Tr. 130, L 13-17), then stongly urged the court to grant probation or to allow both these defendants a new trial (Tr. 130, L 18-23); the district attorney recognized the inherent injustice occasioned by the facts in this case when he advised the court. . . . "Not to grant these defendants a new trial would be in my opinion, a gross injustice, since the agreement by the state's attorney was not performed." (Tr. 130, L 22-25)

After hearing additional supportive evidence of the induced plea, the court denied the Motion for New Trial. (Tr. 148, 125); at the date set for sentencing, the court heard defendants' Motion to Withdraw their pleas and set aside the judgment on the plea of guilty. (Tr. 155). The Sheriff testified that while he was sheriff, he had taken part in many plea bargains in Hays County, Texas, and he could remember no instance where a plea bargain agreement was not honored. (Tr. 160, L 5-12). The defense counsel testified he'd never had a plea bargain rejected in Hays County (Tr. 164, L 10-18); the defense counsel testified to Texas procedure in Hays County and others required defendants to perfunctorily answer negatively to the question of promises (Tr. 166-L 22-25, Tr. 167, L 1-7); the court also acknowledged

he knew that defendants answered "no" to the question of promises in many cases (Tr. 174, L. 12-25).

At the conclusion of the hearing, the Court, without ruling, sentenced the defendants.

The procedure followed in this case is not unusual; it is a scenario acted out daily in countless courts in Texas and other states; the covert nature of plea bargaining traditionally has required defendants to swear in court that no promises were made to induce his plea; while this superficially complies with Rule 11, Federal Rules of Criminal Procedure, it did not realistically reach the root of the evil. Some judges, as did the court in this case, warned the defendant he was not bound by the prosecutorial agreement or recommendation. This reinforced the record against appeal, but victimized the defendants who had been forewarned by their attorneys and the prosecutor of the necessity of this ritual despite the existence of the covert "bargain". The end result, as is graphically shown in this case, was a mockery of justice.

The defendants entered into a plea bargain with the prosecutor which was denied in court and while the defendant is inexorably bound thereby, the prosecutor and the court could abrogate the agreement with impunity.[16]

The rule urged in this point, i.e., allowing withdrawal of the "guilty" plea, when a unilateral abrogation takes place by the court, who insists the defendant is bound nonetheless, would eliminate the hypocrisy and strengthen the criminal justice system by dignifying plea bargains in the states where no uniformity now exists.

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16. See *Dillon v. United States*, 307 F.2d 214 (9th Cir. 1962); Note, Plea Bargaining—Proposed Amendments to Federal Criminal Rule 11, 56 Minn. L. Rev. 718 (1972).

The rule urged, would be the genesis of an enlightened era of criminal justice and the preservation of an important and vital prosecutorial procedure, and the elimination of the defendants "gamble" with his basic constitutional rights. It would return dignity to a proceeding which now disgraces the concept of fairness because it is predicated on deception and hypocrisy which have no place in the American concept of justice.

The Texas procedure contravenes the mandates of Federal Rule 11(e)(4),[17] this Court's decisions in *Santobello v. New York,*[18] and the intent and tenor of the American Bar Association Standards for the Administration of Criminal Justice (Sec. 2.1(a)(ii)(5)), Pleas of Guilty.[19] The Texas procedure is also in conflict with Federal Rule 32(d) allowing plea withdrawals following sentence upon showing of manifest injustice.

The facts, undisputed in this case, and the Texas Appellate decision upholding the pleas as voluntary are in conflict with the Fifth Circuit case of Schnautz v. Beto, 416 Fed. 2d 214 (5th Cir. 1969); the ruling of the Texas Court below is also in conflict with the American Law Institute's Model Code of Pre-Arraignment Procedure (proposed official drafts 1975), Sec. 350.5(4) and 350.6, infra at A 22.

The result engendered by the Court below is in conflict with that Court's own holding which subscribed to a liberal policy concerning withdrawal of guilty pleas. See Garcia v. State, 237 S.W. 279 (Tex. Cr. App. 1922).

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17. Infra at A 1
18. Infra at 11.
19. Infra at A 22.

The opinion of the Texas Court below is also in conflict with the Selikoff Trilogy, 35 N.Y.2d. 227, 318 N.E.2d 784 (1974), cert. denied, 95 S.Ct. 806 (1975).

The covert procedure used below rendered an otherwise voluntary plea involuntary; the state conceded this and joined in requesting plea withdrawal to prevent "a gross injustice". The defendants herein were denied constitutional protections at the time of the waivers and the acceptance of the plea. For these reasons, the Writ should be granted.

ISSUE THREE

The Admonition Statute, Art. 23.16, Texas Code of Criminal Procedure is unconstitutional, as applied by the Texas courts.

ARGUENDO

The statute does not require judicial inquiry into the voluntariness of the defendants' decision to enter a plea of guilty. It does not contain even the basic predicates to insure informed judicial determination if properly applied.

Texas statutes do not recognize plea bargaining; it is a vital element of the criminal justice system in Texas, yet remains clouded by its covert nature. The Texas appellate courts have only inferentially come to grips with the totality of the problems surrounding this covert practice. The Texas courts below in this case recognized the suggested prosecutorial misconduct and ineffective assistance of counsel relative to the adversaries failing to advise the court of the covert bargain by remaining silent during

the admonition, then remarks the record does not support these Standard violations (ABA Prosecutorial and Defense Function, infra at A 12, A 13).

The court recognized the desirable practice of making the covert plea bargain legitimate by placing it on the record, but did not mandate such a procedure leaving Texas law unsettled.

Prosecutors, defense lawyers and defendants are placed in an untenable posture at this time both under the ethical standards as well as the state of the law.

Failure of the Texas courts to come to grips with the basic issues involved in plea bargains despite their full awareness of the application of the admonition statutes abrogates a constitutional responsibility, leaving Texas defendants in a "chilling atmosphere" when plea bargains take place.

Total disregard of the procedures required in spite of the "observations" still requires a sub-rosa process. The undesirable covert procedure which requires a defendant to answer negatively when asked if he was promised anything, and to answer yes, claiming he realizes the Court is not bound by a prosecutorial recommendation ignores the application realities which have been further confused, rather than clarified by this case.

Justice Roberts, in his cogent dissent in this case, recognized that the prerogative to reject the plea bargain is never exercised by many judges, and only rarely by the rest for the obvious reason, it *defeats the whole purpose of the plea bargaining system.* (App. "A", infra at A 15).

The admonition statute requirements if "substantially complied with" renders the plea irrevocable. The Texas

practice requires the waiver of constitutional rights *prior* to acceptance of the plea; no statutory requirement or mandatory opinion requires developing the bargain on the record. No procedural safeguards exist in Texas.

Since voluntariness must be determined at the time the plea was entered and since it does not retroactively change its character, the statute as applied in Texas is unconstitutional. It coercies defendants to irrevocably waive constitutional rights and lose any appellate review on voluntariness because the prevailing practice requires the defendant to answer the statutory admonitions in a matter calculated to insure judicial determination of regularity and not voluntariness in plea acceptances.

In order for the plea to be accepted and the bargain carried out, the defendant must play the game; the scenario was played in this case. The defendants were enmeshed in a judicial trap; they had no procedural safeguards.

In the absence of Texas trial courts being required to make good faith inquiry to the prosecutor, the defense counsel and the defendants so as to develop the "bargain" on the record (before plea acceptance) and to advise whether he'll be bound thereby, the Texas statute as applied to date, is unconstitutional. The *Santobello* recognition of the equities involved are ignored, informed judicial determination of voluntariness is a sham and the only victim is the defendant who is held to his rote answers when all parties including the Texas courts knew this was required by the procedure. Manifest injustice will continue to plague Texas defendants if the application of Article 26.13 Texas Code of Criminal Procedure is continued in its present form. For these reasons, the Writ should be granted.

CONCLUSION

For these reasons stated herein, a Writ of Certiorari should issue to review the judgment and opinion of the Texas Court of Criminal Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for Petitioners does hereby certify that on this the _____ day of May, 1976, he did deposit in the United States Mail, by Certified Mail, Return Receipt Requested, postage prepaid, addressed to the Attorney General of Texas at the address shown, three (3) true and correct copies of this instrument, entitled "Petition for Writ of Certiorari to the Texas Court of Criminal Appeals."

Honorable John Hill
Attorney General of Texas
P. O. Box 12548
Capitol Station
Austin, Texas 78711

Signed:

C. ANTHONY FRILOUX, JR.
Attorney for Petitioners

APPENDIX A

Delbert Allen GIBSON and A. L. Reeves, Jr., Appellants,

v.

The STATE of Texas, Appellee.

No. 50197.

Court of Criminal Appeals of Texas.

Nov. 19, 1975.

Rehearing Denied Feb. 11, 1976.

Defendants were convicted, on guilty plea, before the 22nd Judicial District Court, Hays County, Terry L. Jacks, J., of burglary with intent to commit theft, and they appealed. The Court of Criminal Appeals, Odom, J., held that evidence supported implied finding that there was no guarantee that defendants would receive probation on entering pleas, that attempt to base negotiated plea on guarantee by the prosecutor or defense counsel that defendants will receive a specified sentence or probation violates American Bar Association Standards for Criminal Justice, that preferred practice is that on entry of guilty plea the court inquire whether plea is consequence of negotiation and, if so, what the terms of the negotiated plea are.

Affirmed.

Roberts, J., dissented and filed opinion.

C. Anthony Friloux, Jr., Houston, Rodger M. Zimmerman, San Marcos, for appellants.

Jim D. Vollers, State's Atty., and David S. McAngus, Asst. State's Atty., Austin, for the State.

OPINION

ODOM, Judge.

Appellants and a third codefendant who did not appeal his conviction waived trial by jury and entered pleas of guilty before the court to the offense of burglary with intent to commit theft. The trial court denied probation to these appellants and sentenced each to five years' confinement in the Texas Department of Corrections.

Appellants raise five grounds of error challenging the voluntariness of their guilty pleas and the refusal of the trial judge, after assessment of punishment, to permit withdrawal of the pleas and award new trials. The substance of all grounds of error is stated in appellants' brief as follows:

> "The sole issue is 'whether the plea by Gibson and Reeves was voluntarily made, or whether in truth and fact, it was induced by the plea bargaining guarantee of the State and the Sheriff?' "

The record on appeal before us contains transcribed court reporter's notes from hearings on four different days. On May 16, 1974, the pleas of guilty were entered and accepted, and appellants were found guilty. On July 11, 1974, appellants again appeared and punishment was assessed. On August 28, 1974, the court heard and denied appellants' motion for new trial. Finally, on November

21, 1974, appellants were called before the court for formal pronouncement of sentence.

On May 16, 1974, before accepting appellant Gibson's plea of guilty, the trial judge made the following inquiries, among others:

> "THE COURT: Have you been persuaded to plead guilty against your will?
>
> "THE DEFENDANT: No, sir.
>
> ". . .
>
> "THE COURT: Have you been promised anything in this case
>
> "THE DEFENDANT: No, sir.
>
> "THE COURT: —to plead guilty. You know that if you plead guilty in this case, and the evidence shows that you're guilty, that the attorneys may make a recommendation to the Court, and that's all that is, a recommendation. I do not have to take the recommendation.
>
> "THE DEFENDANT: Yes, sir.
>
> "THE COURT: I will consider it, but that's all; just consider it. If they recommend that you be granted probation, I may deny that recommendation and send you to the penitentiary for as much as twelve years. You understand that?
>
> "THE DEFENDANT: Yes, sir.
>
> "THE COURT: Knowing all that, do you still plead guilty in this case?
>
> "THE DEFENDANT: Yes, sir."

The following inquiries were made of appellant Reeves:

> "THE COURT: Has anyone promised you anything to plead guilty?

"THE DEFENDANT: No, sir.

". . .

"THE COURT: I don't know whether I told A. L. Reeves or not, but the recommendation of the District Attorney or the State is nothing more than a recommendation. He may recommend probation and I could still send you to the penitentiary.

"THE DEFENDANT: Yes, sir."

After accepting the pleas of guilty, the trial judge further stated:

"In addition to announcing judgment here, if you should be granted probation, if you should be, and don't think that I'm saying that you're going to be because I don't know, if your records are not sufficient to warrant what I think would be a good probation risk, well, I will send you to the Department of Corrections. . . ."

On July 11 the case was called for assessment of punishment.[1] Prior to assessment of punishment the prosecutor recommended probation and defense counsel made the following statement to the court:

"Judge, I would respectfully request the Court to be very compassionate in this case and grant these boys probation. The term of probation is not that important. Mr. Fielder has seen fit after reading all the investigation to recommend probation. I know that you're the final word. But we would urge upon the Court to exercise extreme leniency in this case and grant all three of them probation. Thank you."

1. Cf. *Faurie v. State*, Tex. Cr. App., 528 S.W.2d 263 (1975).

The court assessed punishment in each case at five years and denied probation. At that point appellants sought to withdraw their guilty pleas, and defense counsel stated as grounds:

". . . Of course, the State has made its recommendation for probation, realizing, of course, it's discretionary with the Court. But, nevertheless, the decision to enter a plea of guilty was based upon entirely and solely the recommendation for probation and the delusive hope of getting probation. . . ."

The trial court refused to allow withdrawal of the pleas.

Subsequently appellants filed motions for new trial alleging in part that they entered pleas of guilty only because they had been guaranteed probation. Attached was an affidavit by Sheriff Bobby Kinser, read into evidence, in which it is stated:

" 'I am aware of the fact that none of the Defendants in this case would have changed their plea of "Not Guilty" to a "Guilty" plea had they not been assured that they would receive probation."

Also attached was an affidavit by District Attorney Richard Fielder which recites in part:

"I am cognizant of the allegations contained in the foregoing verified Motion for New Trial by the Defendants, Delbert Allen Gibson and A. L. Reeves, Jr., and said allegations are true and correct. Further, in an effort to fairly represent the people of the State of Texas, and by the authority vested in me as District Attorney of the 22nd Judicial District, I made an agreement with the Defendants, Delbert Allen Gibson, A. L. Reeves, Jr., and Larry Wayne Miller,

and their attorney of record, Rodger M. Zimmerman, to recommend probation in their case, if they would change their pleas from "Not Guilty" to "Guilty." The basis for this agreement was to move the trial docket and to see that restitution was made. Restitution was made and the interest of the State of Texas was best served by this "plea bargaining" procedure.

" 'There is not the slightest doubt in my mind that had these Defendants thought that they would not get probation, none of them would have changed their pleas of "Not Guilty" to "Guilty" and thereby given up their fundamental right to a trial by jury." '

Both appellants testified at the hearing on the motion. Both testified that they were promised probation, yet both also admitted that at the time they entered their pleas they told the court that they had been promised nothing and acknowledged that the trial judge had explained to them that any recommendations made would be nothing more than recommendations, and the trial court could sentence them to the penitentiary despite any recommendation of probation.

Following presentation of evidence at the hearing on the motion for new trial, counsel argued:

". . . But I am convinced that these two young men, all three of these young men, would not have changed their pleas if in their own mind they weren't convinced that they were not going to go to the penitentiary. I realize my duty as defense counsel with these individuals; and going further than that duty, knowing what this Court has done in the past or what other courts do in the past. I talked with these Defendants about it and I said, 'Regardless of what the District Attorney does, this judge has the power to do whatever he wants to do within what

we're talking about. But when the State's attorney and the law enforcement agencies all get behind and recommend probation, and will go so far as to promise and add to that if the Court does not for any reason at all 'I'll join with you,' then I think, Judge, to send these two young men to the penitentiary would be a real trick. . . ."

On November 21 appellants appeared for sentencing. Prior to pronouncement of sentence the trial judge permitted the sheriff, defense counsel and himself to be called as witnesses by the defense "to make a record on some matters." Counsel stated that he had filed a "Motion to Set Aside Judgment on Plea of Guilty and Assessment of Judgment [sic?]." The testimony was not relevant to or offered in support of any of the grounds stated in Article 42.07, V.A.C.C.P., as reasons to prevent sentence.[2]

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2. If properly before us (Cf. *McCall v. State*, Tex. Cr. App., 512 S.W.2d 334), the record made at that hearing reflects:

The sheriff testified:

"Q. All right. Is it your testimony that the plea bargaining took place between the prosecution with you yourself as the investigating officer present, the defendants and their lawyer, Mr. Zimmerman?

"A. Yes.

"Q. As a result of that plea bargaining an agreement was reached, was it not, for probation?

"A. That's correct.

"Q. And at that time were the defendants told that if they did plea they would get probation, would not have to go to jail.

"A. Yes, sir."

Defense counsel testified:

"Q. All right. As a result of a negotiation did the District Attorney agree that he would recommend probation and assured them they would not get any jail time.

"A. Yes, sir.

"Q. As a result of that, after your conference with your clients following the negotiation, did they then agree to change their plea on that assurance?

In their brief appellants assert:

"There is no dispute of the following material facts contained in the Statement of Facts:

"A. Yes, sir. I might add to that, the District Attorney told us that in the event something happened, that the Court would not go along with its plea, that if necessary, and went to that extent, he would join us in not opposing a Motion for a new trial, to put them back in the stature they were in prior to changing their plea for which he did, and for which I respect him in living up to his word in doing so, and he did.

". . .

"Q. Was there any question in your mind when you discussed the matter after the plea bargaining with the clients that the plea would be honored?

"A. There really wasn't any question in my mind. I knew the record of the individuals. I knew it was always an outside possibility of being a discretionary matter with the Court that probation would not necessarily be granted. But I had no earthly idea, nor did I suspect of my wildest dreams, that if this honorable Court would not grant probation after the State had recommended it, and after they changed their pleas by a plea bargaining system, that he would not allow them to withdraw their plea and put them back in the same stature they were in prior to changing their plea.

"Q. All right. It was on that feeling or on that decision you made and based on your prior experience never having had any problem in this area that you went ahead and recommended that the bargain that had been made in their presence be honored.

"A. Yes, sir.

"Q. And from your discussion with the client can you testify whether or not they would have gone forward if there had been any question in their mind there was any chance of getting jail time?

"A. No, sir. There's absolutely no question in my mind looking back now that, or at the time, there was no question in my mind but that if they were not assured and they didn't really believe that they were going to get probation they wouldn't have changed their plea; and, further, if there was any remote idea on their mind that they would not be allowed to withdraw their plea if probation was not granted that they would go to the penitentiary, they would never have considered it.

". . .

"(6) That the district attorney Fielder guaranteed Defendants they would get probation and not go to jail if they changed their plea.

"Q. Now, this was, I guess, was communicated to the defendants by yourself, and the investigating officer and the prosecutor.

"A. Yes, sir.

"Q. Now, in regard to the admonition that was given to the defendants which the Court had advised that he was not bound by the recommendation, and so forth, had you heard this admonition on the other cases where the plea bargaining had been honored?

"A. Yes, sir.

"Q. In those cases the defendants likewise say, 'No. The defendant had no bargain.'

"A. That's correct.

"Q. And you're familiar with this practice throughout the State, are you not, trying cases in other districts.

"A. Yes, sir.

"Q. Is that the procedure generally followed as far as your experience has been?

"A. I know of no other procedure.

"Q. We have no real plea bargaining statute in Texas as such which specifies particular sequential questions. Do we?

"A. No, sir.

"Q. All right. Is it your judgment that based on the conversations with the two defendants in this cause that they acted in accordance with what they thought was an agreement which would have resulted in their getting probation in this ultimate decision?

"A. Yes, sir, or in the alternate; at least not have a one-way ticket to the penitentiary."

The trial judge testified:

"Q. Yes, sir. At the time the plea and the recommendation was made the Court had the matter referred to the probation officer for an investigation.

"A. Right.

"Q. All right. At the time the sentencing took place the Court then was aware of the recommendation of the State and also had before it the results of the probation investigation. The Court at that time, as I recall from the record, advised that he was going to, one boy, was going to be given probation. The sentence as to the other two, they had five years, I think, in the Texas Department of Corrections, as the Court could not give

"(7) That the sheriff guaranteed the Defendants if they made restitution and changed their plea, they would get probation and not go to jail.

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probation. I think the Court might have specified the reason for it. Your Honor, prior to this time, since this District Attorney has been in office, I'll ask the question as to the predecessor, has the Court up until the date of the Reeves and Gibson case on recommendation of the State for probation where plea bargaining had taken place, has the Court without any notice on either parties and in specific cases refused to accept the recommendation, even through the Court was then made aware that a plea bargaining had been made, decide that the Court would not follow the bargain and subsequently sentence them to jail time?

"A. I have.

"Q. Does the Court recall prior to this Gibson and Reeves case any specific cases where this wasn't given?

"A. I don't really specifically remember one in Hays County. However, at or about the time these pleas were entered and the plea bargaining was discussed between the defense, and the defendant, and the State's attorney, the recommendation was made to the Court after a presentence investigation was presented to the Court, instead of the defendant having two minor violations I found, as a result of a wrap sheet that was not presented to the Court at the time the plea was entered but was then presented to the Court in the presentence investigation, that the defendant had some ten or twelve arrests in the last three or four years; at which time I declined to follow the recommendation, and sentence the defendant to five years in the penitentiary for burglary. On rehearing I reduced it to four when he made some restitution.

" . . .

"Q. All right, sir. Your Honor took part in the proceeding and during the course of the actual sentencing itself preparatory to the Motion for New Trial. The Court did give the admonition and did make a statement that he was not bound by, according to the statutes itself, any recommendation that had been made by the State. The Court's well aware from the record the defendants' reply to the Court's question 'Have you been promised by anybody . . .' and the rest of the admonition, they said, they responded in the negative. I would ask the Court this. Generally, speaking, in plea bargaining cases isn't it true where there is a recommendation from the State that the defendants respond in this manner?

"A. It is."

"(8) That the defense counsel assured Defendants the bargain and guarantee would be kept by the State.

"(9) That the Defendants would not have changed their plea except for this guarantee."

[1] A reading of the record as a whole, including those portions of the record quoted above, reveals that the assertions made by appellants that they were "guaranteed" probation are by no means established as undisputed fact. Appellants at the time of entering their pleas informed the court that no promises had been made and indicated to the court that they understood any recommendation of probation would not be binding on the court, but to the contrary, the court could sentence them to imprisonment notwithstanding any recommendation of probation. Statements by defense counsel acknowledged full understanding on his part and communication to his clients of the principle of law that on the decision of whether to grant probation the judge is "the final word" and "it's discretionary with the court." The ultimate issue, as framed in appellants' brief, of whether appellants' guilty pleas were induced by a guarantee of probation, was, on the record before us, an issue of fact which the trial court resolved against appellants. The record contains evidence sufficient to support the trial court's implied finding that there was no guarantee, but that instead there was nothing more than a traditional and valid plea bargain by which the prosecutor agreed to recommend probation. It appears that upon failure of the trial court to follow the recommendation for probation appellants sought to withdraw their pleas, not because of failure of a bargain guaranteeing probation, but because their assessment of the weight that the prosecutor's recommendation would carry with the trial court proved inaccurate.

The record does not show that appellants' pleas were induced by a guaranteed probation and the grounds of error are overruled.

[2, 3] Suggested by the record but not adequately developed in the evidence or argued on appeal are possible claims of prosecutorial misconduct, ineffective assistance of counsel, or both. The American Bar Association Standards for Criminal Justice (though not adopted in this State), relating to the Prosecution Function, Approved Draft, 171 (Section 2.8(a)), state, "It is unprofessional conduct for a prosecutor intentionally to misrepresent matters of fact or law to the court." The Standards relating to the Defense Function, Section 1.1(d), likewise state, "It is unprofessional conduct for a lawyer intentionally to misrepresent matters of fact or law to the court." Regarding plea bargains, the Standards relating to the Prosecution Function state in Section 4.3(a) and (b):

> "(a) It is unprofessional conduct for a prosecutor to make any promise or commitment concerning the sentence which will be imposed or concerning a suspension of sentence; he may properly advise the defense what position he will take concerning disposition.
>
> "(b) A prosecutor should avoid implying a greater power to influence the disposition of a case than he possesses."

The following Standards are proposed in the delineation of the Defense Function:

> Section 5.1(b):
>
> "It is unprofessional conduct for a lawyer intentionally to understate or overstate the risks, hazards or prospects of the case to exert undue influence on the accused's decision as to his plea."
>
> Section 7.5(a):
>
> "It is unprofessional conduct for a lawyer knowingly to offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity."

Although the record before us no more supports findings of conduct violative of the above quoted standards than it supports a finding that the pleas were induced by a guarantee of probation, we can only conclude that were it to support the latter, it almost certainly would support the former. The prosecutor and defense counsel are without authority to bind the court to a fixed punishment or to probation by plea negotiation. An attempt to base a negotiated plea upon such a guarantee would violate Prosecution Function Standard 4.3(a) and (b), supra, and Defense Function Standard 5.1(b), supra. To then represent to the court at the entry of the plea that no plea bargain has been struck or that no improper plea bargain has been struck would violate Prosecution Function Standard 2.8(a), supra, and Defense Function Standard 1.1(d), supra. To stand silent while the defendant makes such representations known by the prosecutor and defense counsel to be false would possibly violate both previously cited standards and Defense Function Standard 7.5(a), supra.

[4-7] As previously stated, the record before us does not prove and the brief does not assert violation of the above quoted standards. The record supports the implied findings and the ruling of the trial court. Nevertheless,

we have quoted from the Standards for Criminal Justice in order to draw the attention of the bench and bar to the need for proper conduct of plea negotiations, and demonstrate the soundness of the recommended practice upon entry of a guilty plea of inquiring whether the plea is the consequence of negotiations, and if so, what the terms of the negotiated plea are. Cf. *Galvan v. State,* Tex. Cr.App., 525 S.W.2d 24, in which the trial court, as in the instant case, followed "the highly desirable practice" (*Galvan v. State,* 525 S.W.2d at 26) of explaining to the accused that a recommendation is only a recommendation, and does not bind the Court.[3] No less desirable a practice is that the results of any negotiations upon which the plea is based be made known to the trial court and made a part of the record. See *Cruz v. State,* Tex.Cr.App., 530 S.W.2d 817 (this day decided.) Since properly negotiated pleas are acceptable and improper plea bargains render the plea involuntary, there is nothing to lose and all to gain by bringing the fruit of negotiations out of the closet and into the record.

The record in the instant case supports the conclusion that appellants entered their pleas of guilty voluntarily

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3. We also note that Art. 26.13, V.A.C.C.P., as amended, effective after the trial in this case, provides:

"(a) Prior to accepting a plea of guilty or a plea of nolo contendere, the court shall admonish the defendant of:

"(1) the range of punishment attached to the offense; and

"(2) *the fact that any recommendation of the prosecuting attorney as to punishment is not binding on the court.*

"(b) No plea of guilty or plea or nolo contendere shall be accepted by the court unless it appears that the defendant is mentally competent and the plea is free and voluntary.

"(c) In admonishing the defendant as herein provided, substantial compliance by the court is sufficient, unless the defendant affirmatively shows that he was not aware of the consequences of his plea and that he was misled or harmed by the admonishment of the court." (Emphasis added.)

and knowing that the court was not bound by the prosecutor's recommendation of probation.

The grounds of error are overruled and the judgments are affirmed.

DOUGLAS, J., not participating.

ROBERTS, Judge (dissenting).

This case goes to the heart of the plea bargaining process, questioning the reasons for its very existence. It demonstrates how a common malfunction of the process results in further delays of criminal justice administration, strained relations between bench and bar, and manifest injustice to criminal defendants.

The facts surrounding these guilty pleas are amply set forth in the majority opinion. They present an all too familiar scenario. Accepting the testimony most favorable to the State, it is seen that the defendants changed their pleas to guilty in exchange for the prosecutor's recommendation of probated sentences. Although they were admonished at the time by the trial court that he was not bound to accept the prosecutor's recommendations, and were in all probability so informed beforehand, they quite reasonably expected to receive probated sentences. They would never have changed their pleas if they had thought for a moment that they would wind up in the penitentiary. However, the trial judge rejected the terms of the plea bargain, as was his prerogative. It is a fact, however, that this prerogative is never exercised by many judges, and only rarely by the rest, for the obvious reason that *it defeats the whole purpose of the plea bargaining system.*

That the plea bargaining process is an indispensable element of our criminal justice system there can no longer

be any doubt. See, e. g., *Guster v. State*, 522 S.W.2d 494 (Tex. Cr. App. 1975) (concurring opinion); *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). The bedrock assumption of the process was stated by the Supreme Court in *Santobello* as follows:

> ". . . when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.*, at 262, 92 S.Ct. at 499.

When a defendant does not obtain the sentence he bargained for, even though the prosecutor made the recommendation agreed to, there has been in a very real sense a failure of consideration flowing to the defendant.

Consider briefly the consequences of affirming convictions such as these. Defense lawyers are going to be much more hesitant to enter plea bargains with the prosecutor's office—especially in Hays County—if the judge is simply going to ignore them. This should necessitate trials in at least some cases which would otherwise be settled by negotiated pleas.

> "An accused will be reluctant to engage in negotiations or to enter into a plea agreement if he cannot withdraw his plea of guilty when he does not obtain the expected concessions he was promised." *State v. Wolske*, 280 Minn. 465, 160 N.W.2d 146, 151-52 (1968).

Other aspects of the delay in criminal justice administration caused by the judge's rejection of the plea bargain can be foreseen in the lengthy wrangling over motions to withdraw the guilty plea and in motions for new trial, as in this case, and in appeals such as this.

Moreover, rejection of plea bargains can only lead to strained relations between the bench and bar. Although this case involved uncharacteristic cooperation between defense counsel, the prosecutor's office, and law enforcement officials, the record reveals lack of communication and distrust where the trial judge is concerned. When a judge lends no more credence to a plea bargain than was exhibited in the instant case, he is going to disappoint not only the defense bar, but the prosecutor's office as well.

Consider also the cost in respect for the system that cases such as this engender.

> "It is important for all segments of our society to believe that our court systems dispense justice. This includes the criminals themselves as well as the law abiding citizens and especially those criminals who have cooperated fully in police investigations." *Dube v. State*, 257 Ind. 398, 275 N.E.2d 7 (Ind. 1971).

To that group of criminals might be added those who uphold their end of the bargain and plead guilty. The disillusionment with the criminal justice system already festering in our jails and prisons cannot help but be exacerbated by cases such as those of Gibson and Reeves. And it is not likely that the general public will more readily perceive the justness of such results.

The denial of motions to withdraw guilty pleas in such cases also results in manifest injustice to the defendant. His guilty plea usually waives numerous rights, including the right to a jury trial, the right to confront witnesses and the right to assert whatever defenses he thinks he has. What is the consideration for these concessions if the court rejects the bargain and the plea is irrevocable?

> "More important, we believe, if withdrawal is refused upon proof of an unkept and unfulfilled plea agreement, defendant has been in effect deprived of his right to a jury trial and the benefit of the presumption of innocence—constitutional safeguards to every accused without regard to the probability of his guilt or the truthfulness of any pretrial admissions or confessions." *State v. Wolske, supra* at 151.

What can be more unfair than the procedure countenanced by the majority, whereby a defendant must uphold his end of the bargain, to his irrevocable prejudice, before the court decides whether or not the prosecution's side of the bargain will be upheld?

There has been a growing recognition by other jurisdictions of the problems discussed above. A variety of safeguards surrounding guilty pleas have been adopted, but the one I would urge today is simply this: when the trial judge rejects a plea bargain, the defendant, upon timely request, should have the right to withdraw his guilty plea.

There is admittedly no statutory or case authority in Texas for this rule. In fact, the rule urged would have the effect of overruling express authority to the contrary. *Williams v. State,* 487 S.W.2d 363 (Tex. Cr. App. 1972). The cases of *Trevino v. State,* 519 S.W.2d 864 (Tex. Cr. App. 1975), *Galvan v. State,* 525 S.W.2d 24 (Tex. Cr. App. 1975), and *Cruz v. State,* Tex. Cr. App., 530 S.W.2d 817 (this day decided) to the same effect are distinguishable. In none of those cases were there a timely request to withdraw the guilty plea before imposition of sentence.[1] It should also be noted that Texas subscribes to a liberal policy touching withdrawal of guilty pleas. *Garcia v. State,* 91 Tex. Cr. R. 9, 237 S.W. 279 (1922).

1. Since sentences are not usually probated until after a presentence report has been filed and the time for filing motion for new trial has expired, the sentencing hearing is often the first indication a defendant has that probation will be denied. At this time, good faith would require that the trial judge indicate his dissatisfaction with the prosecutor's recommendation, thereby allowing a timely motion to withdraw the guilty plea before imposition of sentence. It is noted that Trevino, Galvan and Cruz were all sentenced by the same trial judge, who did not afford them this advance warning of his intentions.

See also the American Bar Association Standards Relating to Pleas of Guilty (Approved Draft, 1968), Sec. 3.3(b); The American Law Institute's Model Code of Pre-Arraignment Procedure (Proposed Official Draft, 1975), Sec. 350.5(4), and Rule 11(e), Fed.Rules of Crim.Proc., eff. Dec. 1, 1975, containing similar recommendations.

Perhaps concerned about injustices in the area of voluntary guilty pleas, the 64th Legislature recently amended the applicable statute, Art. 26.13, V.A.C.C.P., by adding among other things the following admonishment prior to acceptance of such pleas:

> "(2) the fact that any recommendation of the prosecuting attorney as to punishment is not binding on the court."

This action codified the recommendations of some cases as to "the better practice". *Trevino v. State,* 519 S.W.2d 864, 868 (Tex. Cr. App. 1975); *Galvan v. State,* 525 S.W.2d 24, 26 (Tex. Cr. App. 1975). It is nevertheless clear that the statutes do not contemplate the rule urged today. It should be noted, however, that such a rule would not rob the trial judge of his discretion to accept or reject a guilty plea. This discretion is essential if the trial judge is to prevent oppressive or unfair bargains and to protect the public interest. The rule would merely permit

an accused to opt for the uncertainties of trial by changing his plea to not guilty when confronted with a trial judge unwilling to accept the prosecutor's recommendation.

It is neither necessary nor appropriate to defer to the Legislature for fashioning this rule. The Legislature wisely left "delusive hope of probation" out of Art. 26.13 as a factor which might invalidate a guilty plea. See also *Valdez v. State*, 507 S.W.2d 202 (Tex. Cr. App. 1974). The Legislature is not blind to the fact that most negotiated guilty pleas are based on some sort of hope of probation. Under the strict language of Art. 26.13, a guilty plea can be accepted even if it is based on a hope of probation which turns out to be delusive. All the rule urged today would do would be to permit the accused to withdraw his guilty plea, upon timely request, if that hope turns out to be delusive. No modification of Art. 26.13 is necessary. Moreover, the amended Art. 26.13 now only requires that a guilty plea be free and voluntary. dropping the proscriptions against fear, persuasion, promises, and delusive hopes of pardon. The way is opened for spreading the terms of plea bargains upon the record, as my Brother Odom has prudently recommended in *Cruz, supra*.

It remains to consider where other jurisdictions stand on this matter. Following the lead of the third[2] and eighth[3] circuits, Congress has finally adopted the long awaited amendments to the Federal Rules of Criminal Procedure. Rule 11(e)(4), effective December 1, 1975 provides as follows:

2. *United States ex rel. Culbreath v. Rundle*, 466 F.2d 730 (3rd Cir. 1972).

3. *United States v. Gallington*, 488 F.2d 637 (8th Cir. 1973), cert. den., 416 U.S. 907, 94 S.Ct. 1613, 40 L.Ed.2d 112 (1974).

> "Rejection of a Plea Agreement. *If the court rejects the plea agreement, the court shall,* on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, *afford the defendant the opportunity to then withdraw his plea,* and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement." (Emphasis added)

It thus appears that the entire federal system now subscribes to the rule urged today. A majority of the states confronting the issue also permit a defendant to withdraw his guilty plea if the judge rejects the plea bargain.[4] Many of those states rejecting the rule have done so after lengthy discussions and over dissenting opinions.[5] Thus, the trend is in the direction of the rule urged here.

4. Connecticut—*Quintana v. Robinson*, 31 Conn.Sup. 22, 319 A.2d 515 (1973).
Florida—*Davis v. State*, 308 So.2d 27 (Fla. 1975).
Georgia—*Burkette v. State*, 131 Ga.App. 177, 205 S.E.2d 496 (1974).
Illinois—Ill.Sup.Ct. Rule 402(d)(2) (1970); Ill.Rev.Stat.1973, ch. 110A, Sec. 402(d)(2).
Indiana—*Watson v. State*, 300 N.E.2d 354 (Ind.1973).
Iowa—*State v. Fisher*, 223 N.W.2d 243 (Iowa 1974).
Minnesota—*State v. Wolske*, 280 Minn. 465, 160 N.W.2d 146, 152 (1968).
New Hampshire—*State v. Farris*, 320 A.2d 642, 644 (N.H.1974) recommended as "prudent".
New Jersey—*State v. Nuss*, 131 *N. J. Super*, 502, 330 A.2d 610 A.D.1974).
Pennsylvania—Rule 319, Pa.Rules of Crim.Proc.; *Commonwealth v. Wilson*, 335 A.2d 777 (Pa.Super. 1975).

5. California—*People v. West*, 3 Cal.3d 595, 91 Cal.Rptr. 385, 477 P.2d 409 (1970).
Massachusetts—*Commonwealth v. Stanton*, 317 N.E.2d 487 (Mass. App.Ct. 1974).

Support for the rule can also be found in the proposed revisions to the American Bar Association Standards Relating to Pleas of Guilty (Approved Draft, 1968), Sec. 2.1(a)(ii)(5)[6] and the American Law Institute's Model

Michigan—*People v. Rogers*, 55 Mich.App. 491, 223 N.W.2d 20 (1974).
Missouri—*Huffman v. State*, 499 S.W.2d 565 (Mo.Ct.App. 1973).
New Mexico—*State v. Ramos*, 85 N.M. 438, 512 P.2d 1274 (N.M. Ct.App. 1973).
New York—*People v. Selikoff*, 35 N.Y.2d 227, 360 N.Y.S.2d 623, 318 N.E.2d 784 (N.Y.Ct.App. 1974), cert. den. 419 U.S. 1122, 95 S.Ct. 806, 42 L.Ed.2d 822 (1975).
Texas—*Williams v. State, supra.*
Wisconsin—*State v. McKnight*, 65 Wis.2d 582, 223 N.W.2d 550 (1974).

6. 2.1 Plea withdrawal.
(a) The court should allow the defendant to withdraw his plea of guilty or nolo contendere whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice.
* * *
(ii) Withdrawal is necessary to correct a manifest injustice whenever the defendant proves that:
(5) he did not receive the charge or sentence concessions contemplated by the plea agreement concurred in by the court, and he did not affirm his plea after being advised that the court no longer concurred and being called upon to either affirm or withdraw his plea.

7. Section 350.5. Additional Action to be Taken by the Court Where There is Plea Agreement
* * *
(4) *Ruling on the Plea.* Before accepting a plea pursuant to a plea agreement, the court shall advise the parties whether it approves the agreement and will dispose of the case in accordance therewith. If the court determines to disapprove the agreement and not to dispose of the case in accordance therewith, it shall so inform the parties, not accept the defendant's plea of guilty or nolo contendere, and advise the defendant personally that he is not bound.
* * *
Section 350.6. Sentencing Following Plea
If, at the time of sentencing, the court for any reason determines to impose a sentence more severe than that provided

Code of Pre-Arraignment Procedure (Proposed Official Draft, 1975), Secs. 350.5(4) and 350.6.[7]

The time is right for Texas to join the growing number of jurisdictions permitting withdrawal of guilty pleas, upon timely request, when the trial court rejects a plea bargain. Only after having been given such an opportunity after the trial judge rejects the plea bargain can a defendant's plea be characterized as voluntary. Accordingly, I would adopt the rule discussed above and reverse these convictions. The causes should be remanded and the appellants given a chance to change their pleas.

DOUGLAS, J., not participating.

for in a plea agreement between the parties, the court shall inform the defendant of that fact and shall inform the defendant that the court will entertain a motion to withdraw the plea. The court after pronouncing the sentence of a defendant who has pleaded guilty or nolo contendere shall inquire of the defendant personally whether the sentence pronounced violates any agreement or understanding the defendant had with respect to the sentence. If the court determines that the sentence pronounced is inconsistent with an agreement, or that it differs from the defendant's understanding in such a way that it would be unjust to permit the defendant's plea to stand, it, shall vacate the plea.

APPENDIX B

CLERK'S OFFICE,

COURT OF CRIMINAL APPEALS OF TEXAS

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 50,197 styled:

DELBERT ALLEN GIBSON and A. L. REEVES, JR., Appellants

vs.

State of Texas, Appellee

judgment of 22nd Judicial District Court of Hays County, Texas, was affirmed on November 19, 1975. Appellant's Motion for Leave to File Motion for Rehearing denied on February 11, 1976 and on February 19, 1976 mandate issued.

THEREFORE, with the denying of Appellant's Motion for Permission to file Motion for Rehearing, this cause was disposed of by this Court on February 11, 1976, appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas, and said judgment has now become final on the docket of this Court.

WITNESS my hand and Seal of said Court, at office, in Austin, Texas, this the 11th day of March A.D. 1976. (SEAL)

/s/ GLENN HAYNES
Glenn Haynes, Clerk of
Criminal Appeals of Texas

TO: Mr. Roger M. Zimmerman
Attorney at Law
235 LBJ Drive
San Marcos, Texas 78666

COURT OF CRIMINAL APPEALS OF TEXAS

CLERK'S OFFICE

Austin, Texas, February 11, 1976

Dear Sir:

I have been instructed to advise that the Court has this day denied "Leave To File" the appellant's Motion for Rehearing in Cause No. 50,197, Delbert Allen Gibson and A. L. Reeves, Jr. vs. THE STATE OF TEXAS Appellee.

Sincerely yours,

GLENN HAYNES, Clerk

APPENDIX C

IN THE
DISTRICT COURT OF HAYS COUNTY, TEXAS
22ND JUDICIAL DISTRICT

Cause No. 8514 & 8516

THE STATE OF TEXAS

vs.

DELBERT ALLEN GIBSON and A. L. REEVES, JR.

DEFENDANTS' MOTION FOR NEW TRIAL

COMES NOW, DELBERT ALLEN GIBSON and A. L. REEVES, JR., DEFENDANTS in the above numbered and entitled cause and, pursuant to Article 40.03 (9) of the Texas Code of Criminal Procedure, and file this their verified Motion for New Trial with attached Exhibits, and would show the Court the following:

I

That, on or about the 7th day of September, A.D., 1973, your Defendants were indicted in the above numbered cause for the offense of burglary, and said indictment was signed by Foster Marlow, Foreman of the Grand Jury for the 22nd Judicial District Court, September, 1973 term. That, thereafter, on or about November 19, 1973, the Defendant's both entered their formal plea of "Not Guilty" and demanded a Jury Trial.

II

That, both the Defendants were represented by Rodger M. Zimmerman, a practicing attorney in San Marcos,

Hays County, Texas, and that, subsequent to the Defendant's arraignments and pleas of "Not Guilty" taken by the Court, Counsel for the Defense began to prepare for trial.

Thereafter, a Motion and Order setting the Defendants' case for trial, along with one Larry Wayne Miller, Co-Defendant, hereinafter referred to at a later time, was forwarded to Defense Counsel setting the Defendants' cases of burglary for jury trial on the 29th day of July, 1974.

III

That, subsequent to receiving the aforementioned setting for trial, Defense Counsel, in preparation for same, on separate occasions, contacted the arresting officer, Sheriff Bobby Kinser of Hays County, Texas, as well as the District Attorney for the 22nd Judicial District, Mr. Richard Fielder, of Lockhart, Texas. In discussing matters which might be heard for pre-trial, the Sheriff and District Attorney both indicated a desire to explore the possibility of having the Defendants change their pleas from "Not Guilty" to "Guilty." After much negotiating and many meetings with the law enforcement agency involved, i.e. the Sheriff's Department of Hays County, and with the District Attorney, Counsel for the Defense was of the opinion that both the District Attorney and the Law Enforcement Agency would not oppose probation if a plea of "Guilty" were entered.

IV

Thereafter, Counsel for the Defense consulted with his clients then being Larry Wayne Miller, Delbert Allen Gibson, and A. L. Reeves, Jr., in an effort to discern

whether or not any one or all of the Defendants would consider changing their pleas. All Defendants were skeptical, and unsure, and only after being assured of probation by way of plea bargaining would they consent to changing their pleas.

V

On or about May 16, 1974, outside the Courtroom of the 22nd Judicial District Court, the duly elected District Attorney assured all three of the Defendants, Larry Wayne Miller, Delbert Allen Gibson, and A. L. Reeves, Jr., in the presence of Defense Counsel, that they would be granted probation if they would enter a plea of "Guilty."

That, on the same day, May 16, 1974, Terry L. Jacks, Judge Presiding, took the pleas of "Guilty" from all three Defendants and accepted an application for probation. The Court then set July 11, 1974, as the hearing date for the assessment of punishment.

VI

Thereafter all three Defendants were interviewed by the Hays County Probation Department on different occasions and were never led to believe that there would be an unfavorable report filed by said Probation Department. Further, Counsel for the Defense, after inquiring of the Probation Department, was never led to believe that the Probation Report would be unfavorable.

VII

Thereafter, on July 11, 1974, the Court, with Terry L. Jacks presiding, sentenced all three Defendants, Larry

Wayne Miller, Delbert Allen Gibson and A. L. Reeves, Jr., to five (5) years in the State Penitentiary, and probated the sentence of Co-Defendant Larry Wayne Miller, and refused to grant probation for the Defendants Delbert Allen Gibson and A. L. Reeves, Jr.

VIII

The Defendants herein would show unto the Court, by this their verified Motion that they were induced by and changed their pleas to "Guilty" for the sole and unconditional belief that they, the said Delbert Allen Gibson and A. L. Reeves, Jr., would be granted probation. That, further, had there been no such belief in their minds, they would not have changed their plea from "Not Guilty" to "Guilty." Based upon the promise of the District Attorney, coupled with the desires of the Law Enforcement Agency, they would not have given up their fundamental right to a trial by jury, had they not been assured of probation.

IX

Therefore, your Movants herein allege that they were fraudulently induced into changing their plea and that said fraud is contrary to law, and that they should be granted a New Trial in this cause.

/s/ DELBERT ALLEN GIBSON
Delbert Allen Gibson

/s/ A. L. REEVES, JR.
A. L. Reeves, Jr.

/s/ RODGER M. ZIMMERMAN
Rodger M. Zimmerman
Attorney for Defendants

STATE OF TEXAS §
COUNTY OF HARRIS §

On this the 15th day of July, A. D., 1974, personally appeared Delbert Allen Gibson and A. L. Reeves, Jr., and after first being sworn by me the undersigned authority, stated to me that they had read the above and foregoing Motion and further stated that it was true and correct.

/s/ DELBERT ALLEN GIBSON
Delbert Allen Gibson

/s/ A. L. REEVES, JR.
A. L. Reeves, Jr.

SWORN and SUBSCRIBED to before me this the 15th day of July, A. D., 1974.

/s/ GERALDINE GARRETT
NOTARY PUBLIC in and for
Harris County, Texas

(SEAL)

EXHIBIT "A"

IN THE DISTRICT COURT
OF HAYS COUNTY, TEXAS
22ND JUDICIAL DISTRICT

Cause No. 8514 & 8516

STATE OF TEXAS

v.

DELBERT ALLEN GIBSON and A. L. REEVES, JR.

AFFIDAVIT IN SUPPORT OF THE
DEFENDANTS' MOTION FOR NEW TRIAL

COMES NOW, the undersigned, Bobby Kinser, duly elected Sheriff of Hays County, Texas, and would show the Court the following:

My name is Bobby Kinser, Sheriff of Hays County, Texas. I was the arresting officer in the above numbered and styled burglary case and I am cognizant of the allegations contained in the foregoing Motion for New Trial filed by Delbert Allen Gibson and A. L. Reeves.

I am aware of the fact that none of the Defendants in this case would have changed their plea of "Not Guilty" to a "Guilty" plea had they not been assured that they would receive probation.

In support of this knowledge, further, I assisted the State of Texas by contacting the complaining witness in an effort to determine the restitution necessary, and provide said information to the Defendants' attorney. The restitution has been made in full, and it was and still is

the desire of the Sheriff's Department of Hays County, Texas, that Delbert Allen Gibson and A. L. Reeves, Jr., be granted probation, but to the best of my knowledge I can swear that these young men would not have changed their plea from "Not Guilty" to "Guilty" if they had known there was a chance that they could go to the penitentiary.

EXECUTED this the 2nd day of July, A.D., 1974.

/s/ BOBBY KINSER
Bobby Kinser, Sheriff,
Hays County, Texas

SWORN to and SUBSCRIBED before me, the undersigned authority by the said Bobby Kinser, this the 2nd day of July, A.D., 1974.

/s/ Signature Not Legible
NOTARY PUBLIC in and for
Hays County, Texas

EXHIBIT "B"

IN THE DISTRICT COURT
OF HAYS COUNTY, TEXAS
22ND JUDICIAL DISTRICT

Cause No. 8514 & 8516

STATE OF TEXAS

v.

DELBERT ALLEN GIBSON and A. L. REEVES, JR.

AFFIDAVIT IN SUPPORT OF THE
DEFENDANTS' MOTION FOR NEW TRIAL

COMES NOW, the undersigned, Richard Fielder, duly elected District Attorney for the 22nd Judicial District for the State of Texas, and would show the Court the following:

My name is Richard Fielder, duly elected District Attorney for the 22nd Judicial District of Texas.

I am cognizant of the allegations contained in the foregoing verified Motion for New Trial by the Defendants, Delbert Allen Gibson and A. L. Reeves, Jr., and said allegations are true and correct. Further, in an effort to fairly represent the people of the State of Texas, and by the authority vested in me as District Attorney of the 22nd Judicial District, I made an agreement with the Defendants, Delbert Allen Gibson, A. L. Reeves, Jr., and Larry Wayne Miller, and their attorney of record, Rodger M. Zimmerman, to recommend probation in their case, if they would change their pleas from "Not

Guilty" to "Guilty." The basis for this agreement was to move the trial docket and to see that restitution was made. Restitution was made and the interest of the State of Texas was best served by this "plea bargaining" procedure.

There is not the slightest doubt in my mind that had these Defendants thought that they would not get probation, none of them would have changed their pleas of "Not Guilty" to "Guilty" and thereby given up their fundamental right to a trial by jury.

As District Attorney I strongly urge the Court to reconsider and grant probation to Delbert Allen Gibson and A. L. Reeves, Jr., or, in the alternative, to allow both these Defendants a new trial by way of their Motion, and grant them a new trial. Not to grant these Defendants a new trial would be in my opinion a gross injustice, since the agreement by the state's attorney was not performed; and further, to grant a new trial in this case would not be an injustice to the State of Texas.

EXECUTED this the 12th day of July, A.D., 1974.

/s/ RICHARD FIELDER
Richard Fielder, District Attorney
22nd Judicial District of the
State of Texas

SWORN and SUBSCRIBED before me, the undersigned authority by the said Richard Fielder, this the 12th day of July, A.D., 1974.

/s/ HAZEL ANN DUNCAN
District Court Clerk, in and for
Hays County, Texas

IN THE DISTRICT COURT
OF HAYS COUNTY, TEXAS
22ND JUDICIAL DISTRICT

Cause No. 8514 & 8516

STATE OF TEXAS

v.

DELBERT ALLEN GIBSON and A. L. REEVES, JR.

AFFIDAVIT IN SUPPORT OF THE
DEFENDANTS' MOTION FOR NEW TRIAL

COMES NOW, the undersigned, Larry Wayne Miller, Co-Defendant in the above numbered and entitled cause, and named as Co-Defendant in said Motion, and would show the Court the following:

My name is Larry Wayne Miller, and I am a Co-Defendant in the above numbered and entitled cause.

I am cognizant of the allegations contained in the foregoing verified Motion for New Trial, and said allegations are true and correct. As stated therein, and upon my oath, I now state that I changed my plea from "Not Guilty" to "Guilty" only for the reason that I was promised probation. I know that if I had not been promised probation, or that if I had been told that there was a chance that I would be sentenced to confinement in the penitentiary, I would not have changed my plea from "Not Guilty" to "Guilty," giving up my rights to a trial by jury.

/s/ LARRY WAYNE MILLER
Larry Wayne Miller
Co-Defendant

SWORN to and SUBSCRIBED before me this the 15th day of July, A.D., 1974, by the said Larry Wayne Miller.

/s/ GERALDINE GARRETT
NOTARY PUBLIC in and for
Harris County, Texas

APPENDIX D

IN THE DISTRICT COURT
OF HAYS COUNTY, TEXAS
22ND JUDICIAL DISTRICT

STATE OF TEXAS

v.

DELBERT ALLEN GIBSON and A. L. REEVES, JR.

JUDGMENT OF CONVICTION

On this the 21st day of November, A. D., 1974, this cause was called for trial, and the State appeared by her District Attorney, and the Defendants, Delbert Allen Gibson and A. L. Reeves, Jr., having been duly arraigned, appeared in person, in open court, their counsel also being present, and both parties announced ready for trial; and it appearing to the Court that the Defendants, their counsel, and the State's attorney have agreed in writing in open court to waive a jury in the trial of this cause and to submit this cause to the Court; and the Court having consented to the waiver of a jury herein, the indictment was read, and the Defendants entered their pleas of guilty thereto, and thereupon the said Defendants were admonished by the Court of the consequences of said plea, and the said Defendants persisted in their plea; and it plainly appearing to the Court that the Defendants are sane and that they are uninfluenced in making said plea by any consideration of fear, or by any persuasion, or delusive hope of pardon prompting them to confess their guilt, the said plea is by the Court received and here now

entered of record upon the minutes of the court as the plea herein of said Defendants.

And the Court having heard all the evidence submitted for the State and the Defendants and argument of counsel is of the opinion and so finds that the said Defendants are guilty of the offense of Burglary.

And it appearing to the Court that the Defendants, their counsel, and the State's attorney have agreed in writing in open court to waive a jury and to submit the assessment of Defendants' punishment to the Court; and the Court having consented to the waiver of a jury herein, and after having heard all the evidence submitted for the State and the Defendants and argument of counsel the Court is of the opinion and so finds that the said Defendants' punishment should be by confinement in the Texas Department of Corrections for a term of 5 years.

IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court that the Defendants, Delbert Allen Gibson and A. L. Reeves, Jr., are guilty of the offense of Burglary as found by the Court, and that they be punished as found by the Court, that is by confinement in the Texas Department of Corrections for a term of 5 years, and that the State of Texas do have and recover of the said Defendants all costs in this prosecution, for which execution may issue; and that the said Defendants be remanded to jail to await the further orders of the Court herein.

/s/ TERRY L. JACKS
Judge Presiding

IN THE DISTRICT COURT
OF HAYS COUNTY, TEXAS
22ND JUDICIAL DISTRICT

STATE OF TEXAS

v.

DELBERT ALLEN GIBSON and A. L. REEVES, JR.

September Term, A. D., 1974 — DATE:

November 21, 1974

SENTENCE

This day this cause being again called, the State appeared by her District Attorney, and the Defendants, Delbert Allen Gibson and A. L. Reeves, Jr., were present in open court in person, with their attorneys, Rodger M. Zimmerman and C. Anthony Friloux, Jr., for the purpose of having the sentence of the law pronounced in accordance with the judgment herein rendered and entered against the said Defendants. And thereupon the Defendants were asked by the Court whether they had anything to say why said sentence should not be pronounced against them, and the Defendants answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of the said Defendants to pronounce sentence against them as follows:

It is ORDERED by the Court that the Defendants, Delbert Allen Gibson and A. L. Reeves, Jr., who have been adjudged to be guilty of the offense of Burglary be, and are hereby sentenced to confinement in the Texas

Department of Corrections for a term of not less than five (5) nor more than five (5) years, and that the State of Texas do have and recover of said Defendants all costs of this prosecution, for which execution may issue against the property of said Defendants and that the Defendants be delivered by the Sheriff of Hays County, Texas, or the authorized agent of the State of Texas, to the Director of the Texas Department of Corrections, or other person legally authorized to receive such convicts, and the said Defendants shall be confined in the manner and for the period aforesaid.

And the said Defendants are hereby remanded to jail until the directions of this sentence can be obeyed; provided, however, that the bonds heretofore filed in this court for each of the defendants are approved as appeal bonds.

/s/ TERRY L. JACKS
Judge 22nd Judicial District
of Texas